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No. 08-182

IN THE

Supreme Court of the United States

CANYON COUNTY,

Petitioner,

v.

SYNGENTA SEEDS, INC., *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner, Canyon County, has demonstrated that this case presents important questions in the administration of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (hereafter "RICO") that reflect splits in the circuits and about "proximate cause," a factor in all damage litigation, not just RICO . As to the first question, whether the term "business or property" should be read plainly, the Respondents split hairs and contend that there is a difference between a lawsuit to collect unpaid taxes (which is one for property) and one to collect lost revenue (which is not). This is a distinction without a difference, and no authority supports it. In fact, on September 2, 2008, after the Petition was filed, the Second Circuit switched its position from agreeing with the Ninth Circuit's analysis of this question to flatly opposing it. City of New York v. Smokes-Spirits.Com, Inc. ("Thus, we hold that lost taxes can constitute injury to business or property for purposes of RICO..." distinguishing Canyon County).[1] This

[1] _ F.3d _, 2008 U.S. App. LEXIS 18746 at *44 (2d Cir. Sept. 2, 2008).

highlights the need to resolve the split created by the Ninth Circuit.

As to the second question, Respondents try to justify the Ninth Circuit's peculiar approach to proximate causation by asserting that this Court radically changed the concept two years ago in Anza v. Ideal Steel Supply Corp.[2] Now, according to Respondents, the direct injury requirement has been dispensed with and replaced by the touchstone of "remoteness." But City of New York and a Seventh Circuit decision issued after the Petition was filed refute Respondents' contention.[3] Neither Circuit changed the proximate causation analysis in light of Anza, and both consider a range of factors in this analysis.

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[2] 547 U.S. 451 (2006).

[3] RWB Serv. LLC v. Hartford Computer Group, Inc., 2008 U.S. App. LEXIS 18142 at *16-17 (7th Cir. Aug. 25, 2008)(concluding that proximate causation under RICO is determined primarily by the foreseeability of harm, that there can be multiple victims of a RICO violation, each being able to assert a direct injury, and that this analysis was not altered by Anza).

I. THERE IS NO REAL DIFFERENCE BETWEEN AN ACTION TO COLLECT TAXES AND ONE TO COLLECT REVENUE.

As Canyon County argued, the phrase "business or property" in § 1964(c) of RICO is capacious enough to include a government's claims to collect unpaid taxes. And this creates a clear split with the Ninth Circuit. Petition at 10. Respondents contend there is no split of authority because the Second and Seventh Circuits did not address the use of RICO to seek recovery for the costs of providing "government services," and the two are materially different. Respondents' Brief In Opposition at 11 (hereafter "Respondents' Br."). Since both the failure to pay taxes and the depletion of government revenues through the improper use of services cost money, and money is property, there is no distinction from the standpoint of the "business or property" inquiry. *See, e.g.*, Reiter v. Sonotone, 442 U.S. 330, 339 (1979)(holding that the loss of money was an injury to "property"). Although Canyon County is the first reported appellate decision where a government entity has used RICO to recover the costs of providing services, the

Sixth and Fifth Circuits have upheld the right of counties to sue for recovery of excessive charges,[4] payments made higher than the market price, and for goods not received.[5]

Moreover, it is well-settled that a municipality may sue to recover money paid without authority. 15 Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS, § 39:47 (3d ed. 2005)("The familiar rules are that: (1) when the money of a municipality has been paid out on a contract or for an indebtedness which the municipality has no authority to make or incur, it may be recovered...").[6] As noted in the Petition, in

[4] County of Oakland v. City of Detroit, 866 F.2d 839, 847 (6th Cir. 1989)("the counties at least sustained an injury in their property when they paid the allegedly excessive charges").

[5] Alcom County Miss. v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 1169 (5th Cir. 1984) (fraud in inducing contract payments higher than market value and for goods not received held to be an injury to "business or property")

[6] The Idaho Supreme Court has expressly upheld governmental actions to recover or protect tax revenues from improper depletion. Independent Sch. Dist. v. Common Sch. Dists., 55 P.2d 144, 147 (Idaho 1936)(holding that a school district could sue for "recovery or protection" of its funds). Moreover, the

1996 Congress amended RICO to enable "persons" (which includes government entities) to sue to recover the damages caused by the employment of illegal immigrants. Petition at 3. That year Congress, in a second law addressing the illegal immigration problem, also forbade local and state governments from providing services to illegal immigrants.[7] Against this sea change in public policy, the Ninth Circuit reached the extraordinary conclusion that it is "particularly inappropriate to label a governmental entity injured in its property when it spends money on the provision of additional public services, *given that those*

Idaho Racketeering Act, modeled on the federal RICO statute, makes it a predicate offense to submit a "false or fraudulent claim" to a county for payment. Idaho Code § 18-2706. Canyon County asserted this claim against Respondent Pacheco.

[7] 8 U.S.C. § 1621(a)(3)(providing that an unauthorized alien is "not eligible for any State or local public benefit," which includes all non-emergency services). Respondents contend that Canyon County "made a policy choice to provide the law enforcement and health care services at issue." Respondents' Br. at 6 n.1. Canyon County never made a "choice" to provide these services to illegal aliens. Congress foreclosed that possibility a decade earlier.

services are based on legislative mandates and are intended to further the public interest."[8] How did Canyon County "further the public interest" by providing taxpayer dollars to criminal aliens using fraudulent identity documents when Congress expressly prohibited such expenditures? No answer was provided. And why did the Ninth Circuit simply ignore the Idaho cases expressly allowing counties to sue to recover funds improperly disbursed? No answer was provided. Why is Canyon County different from Oakland County or Alcorn County other than its Circuit?

Respondents also point out that the Ninth Circuit noted that "the common law doctrine barring government recovery of the public safety services in tort supports our holding." Respondents' Br. at 8; Pet. App. 31a.[9] Respondents fail to point out that the Ninth Circuit correctly held the municipal cost

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[8] Pet. App. 22a (emphasis added) (citation omitted).

[9] This doctrine is known as the "municipal cost recovery rule." *See, e.g.*, City of Flagstaff v. Atcheson, Topeka & Santa Fe Ry. Co., 719 F.2d 322 (9th Cir. 1983)(recognizing the application of the rule to bar recovery of the Arizona common law claim of a city in a diversity suit).

recovery rule has no application to this RICO case. "In this instance, we are not dealing with state common law, but with a statutory cause of action created by Congress." Pet. App. 32a. Respondents further assert that Petitioner somehow "conceded" application of the rule to this case. Respondents Br. at 9. This is incorrect. In the district court, Canyon County conceded that the rule existed but argued forcefully that it had no application in this RICO case. Pet. App. 55a.

Finally, Respondents contend Canyon County urged the Ninth Circuit to construe the term "business or property" in a manner which bars its claim. Respondents' Br. at 9. This too is incorrect. Canyon County noted that this Court has held twice that § 1964(c) of RICO was modeled on § 4 of the Clayton Antitrust Act.[10] But that does not mean a RICO plaintiff must also prove an antitrust injury to recover. This Court has twice rejected that notion. Petition at 17-18.

In conclusion, Respondents have not demonstrated the absence of a circuit split on the important question of whether recovery of

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[10] Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268 (1992); Anza, 547 U.S. at 457.

expenditures for illegal aliens is "business or property" under § 1964(c). The Second Circuit's timely reversal on this point and its express acknowledgment of a split created by the Ninth Circuit's decision in this case underscores the split is real and the need to resolve it now.[11]

II. RESPONDENTS ACKNOWLEDGE THE NINTH CIRCUIT'S APPROACH TO PROXIMATE CAUSATION IS AT ODDS WITH EVERY OTHER COURT.

The Petition's second question is premised upon the Ninth Circuit's conclusion that the County's claimed injury was not proximately caused by the Respondents' RICO violations. In its analysis the Ninth Circuit rejected the suggestion that it consider whether there was a more immediate victim of the RICO violations which would intervene in the

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[11] To reiterate, the Sixth and Fifth Circuits permit counties to sue under RICO to recover improper payments, and the Second and Seventh Circuits have permitted counties to use RICO to recover unpaid taxes. The split with the Ninth Circuit is thus 4-1. Once again, the Ninth is an outlier; it should be returned to the range of the law of the other circuits.

causation analysis. It held that step in the analysis was unnecessary ("we need not inquire into the question whether there are more immediate victims of the defendants' alleged RICO violations who are likely to sue").[12] In the Ninth Circuit's view, the possibility of "numerous alternative causes that might be the actual source or sources of the County's alleged harm," Pet. App. 42a, made it clear that the County's claim failed this Court's test for proximate causation.

A. The Ninth Circuit's Interpretation of *Anza* Creates a Three-Circuit Split.

The Ninth Circuit and Respondents contend this analysis – dismissal because of the possibility of other causes – is mandated by one sentence in Anza: "The cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)."[13] Both the Ninth Circuit and Respondents read this sentence out of context. The context in Anza was that Plaintiff Ideal Steel expressly pleaded that the RICO violations had harmed the State of

[12] Id. at 983.

[13] Anza, 547 U.S. at 458.

New York, which the Court properly construed as the direct injury. Once a more direct injury of the RICO violations of mail fraud was admitted, then Ideal Steel was properly viewed as asserting an indirect injury.[14]

B. "Substantial Factor," Not "Sole Cause," is the Proximate Cause Test.

Neither the Ninth Circuit nor Respondents have cited to a decision of any other court which has followed the Canyon County proximate cause analysis either before, or after, Anza.[15] The Petition cites a plethora of decisions from across the Circuits, adhering to the view that claims alleging direct injury satisfy the proximate causation requirement.

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[14] Id. at 460, "There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly."

[15] In a footnote, Respondents assert that Sanchez v. Triple-S Mgmt. Corp., 492 F.3d 1, 13-24 (1st Cir. 2007) supports their view that there is precedent for "dismissal" of a RICO claim because of the perceived speculativeness or remoteness of the harm. Respondents' Br. at 17 n. 7. This case does not support that proposition, as it merely affirmed a summary judgment entered after "voluminous" discovery and did not analyze proximate causation.

Petition at 20 n. 21. Respondents counter that these decisions are pre-Anza. Respondents' Br. at 17 n. 6. City of New York is post-Anza and holds to the contrary, directly conflicting with the Ninth Circuit's analysis:

> [W]e do not read the Supreme Court's holding in Anza to disrupt the substantial factor doctrine. So long as the defendant's acts played a substantial part in causing the alleged injury, those acts may be said to have directly caused the injury, as Anza requires.[16]

Accordingly, the Second Circuit concluded that the City's injury, lost tax revenues, satisfied both Holmes and Anza because it was a direct injury.[17] The Second Circuit also limited Anza to competitor versus competitor claims for lost profits.[18] The Seventh Circuit has recently issued an opinion which also refutes Respondents' assertion that Anza changed the law. It holds, "Saying that the

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[16] City of New York, 2008 U.S. App. LEXIS at *37 n. 23 (internal citation and quotations omitted).

[17] Id. at *34 n. 21.

[18] Id. at *33.

injury to the plaintiff is direct is akin to saying that the victim was reasonably foreseeable, the traditional principle for hemming in tort liability."[19]

The principle to be drawn here is that proximate cause does not mean sole cause, and once that is understood, then the concerns with "speculation" and "remoteness of injury" must be put to one side.[20] This Court's opinion in Bridge makes it clear that foreseeability of harm is very much a part of the inquiry.[21] For this reason, proximate cause is ordinarily a merits question for the jury.[22] And every Circuit except the Ninth

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[19] RWB Serv., 2008 U.S. App. LEXIS 18142 at *16.

[20] Sosa v. Alvarez-Machain, 542 U.S. at 692, 704 (2004)("but a given proximate cause need not be, and frequently is not, the exclusive proximate cause of the harm")(internal citation omitted).

[21] Bridge, 128 S. Ct. 2131, 2144 (2008).

[22] *See, e.g.*, Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 612 (6th Cir. 2004) ("Proximate cause poses a merits question involving common law and prudential limitations on the consequences for which the law will hold a defendant accountable, regardless of the plaintiff's standing to sue. *See* Holmes, 503 U.S. 258, 268"); Hedrick v. Daiko Shoji Co., 715 F.2d 1355, 1357 (9th Cir. 1983).

has applied this fact-based inquiry to questions of proximate causation in RICO.[23]

C. The County's Case is not Difficult to Prove, and Harm Caused by Employing Illegal Immigrants Was Foreseeable as a Matter of Law.

The County can easily prove its RICO case. All it needs to do is establish that the illegal immigrants who have signed up for its welfare program or were incarcerated were

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[23] *See, e.g.*, Williams v. Mohawk Indus., Inc., 465 F.3d 1277, 1288 n.5 (11th Cir. 2006)("In both federal RICO and federal antitrust cases proximate cause is not... the same thing as sole cause, and it is enough for the plaintiff to plead and prove that the defendant's tortuous or injurious conduct was a substantial factor in the sequence of responsible causation")(internal quotations omitted); Trollinger, 370 F.3d at 619; Holmes, 503 U.S. at 269 ("Proximate cause is a flexible concept..."); Phoenix Bond & Indem. Co. v. Bridge, 477 F.3d 928, 930 (7th Cir. 2007)("The Court acknowledged in Holmes that proximate causation, a term long used in tort law, poses a set of questions to ask; it is not a formula to be applied algorithmically. Is someone else a distinctly better enforcer? Does the presence of intermediate parties make it too hard to calculate damages - or create a risk that recovery by this plaintiff will come at the expense of someone with a better claim?"), aff'd., 128 S. Ct. 2131 (2008).

employed by the Respondents.[24] Thus, the Ninth Circuit's conclusions about the difficulty of proving the County's case, Pet. App. 42a-43a, are sheer speculation and quite wrong. Moreover, the well-established rules of the Restatements of Torts and Agency support the County's case on the issue of the foreseeability of harm from employing known criminals. Pet. 21-24. Respondents counter that these rules do not establish proximate causation. Respondents' Br. at 18. This is simply wrong. These rules establish the foreseeability of harm caused by employing dangerous people, thus satisfying one of the key aspects of proximate causation, as has been demonstrated. Respondents also contend the County cannot assert its claim for damages because its injury was not "related" to the employment of the illegal immigrants. Id. at 18 n.8. None of the authorities cited support this contention. As the Arkansas Supreme Court held in addressing this question: "It is not necessary

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[24] The County's Complaint alleges that Respondents use recruiters to obtain illegal immigrants who are brought into the County from Mexico to work for them. Pet. App. 75a, ¶¶ 17-18, 80a, ¶¶ 30-32. Thus, the identities of these illegal workers can be discovered.

that the employer foresee the particular injury that occurred, but only that the employer reasonably foresee an appreciable risk of harm to others."[25]

In short, the County's case does not involve a derivative injury, undue speculation or the apportionment of damages among various parties. Therefore, none of the concerns of Holmes or Anza exist here. Therefore, this Court should accept the Petition to resolve the conflict created by the Ninth Circuit's application of these cases. If left unresolved, the Ninth Circuit's mechanical sole cause approach to proximate causation will also confuse antitrust and tort litigation.

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[25] Saine v. Comcast Cablevision of Ark. Inc., 126 S.W.3d 339, 342 (Ark. 2003). This is the law in the Ninth Circuit. *See, e.g.*, Kennedy v. Ridgefield City, 439 F.3d 1055, 1064 n. 5 (9th Cir. 2006)("We have never required that, for a danger to exist, the exact injury inflicted by a third party must have been foreseeable. Instead, the state actor is liable for creating the foreseeable danger of injury given the particular circumstances" and noting it is a jury question).

III. ISSUES NOT RAISED IN THE PETITION.

Respondents additionally make arguments having nothing to do with the two questions presented in the Petition. Respondents' Br. at 19-21. But since Respondents did not file a cross-petition for certiorari, these questions are not before the Court. Additionally, they were not raised below, and consequently, were not addressed by the Ninth Circuit.

CONCLUSION

For the reasons set forth above and in the Petition, the Petition for Certiorari should be granted.

Respectfully submitted,

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